Supreme Court of United States.

DECEMBER TERM, 1872.—No. 142.

P. De Cordova,
Appellant,
AGAINST
Mary Hood and Others,
Appellees.

Appeal from decree of Circuit Court of U. S. for Western district of Texas.

Statement of the Case.

CONWAY ROBINSON,
One of Appellant's Counsel.

February 8, 1873.

H. Polkinhorn & Co., prs, Washington, D. C

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Statement of the Case.

The appellant as assignee in bankruptcy of the estate of Z. Bartlett, who was assignee of B. G. Shields, filed a bill to enforce the vendor's lien on land bargained and sold by Shields to H. M. Hood, for $27,000, "*to be paid*" in installments, the last of which is "$9,000, on the 1st day of April, 1862," with interest, The deed of the 5th of February, 1859, after specifying the installments to be paid, and describing the land, contains this language—"These two tracts, comprising 1800 acres, I sell and convey by this deed to H. M. Hood, 'for the consideration aforementioned.'" Afterwards are these words:—"*Upon the completion of the payments* before mentioned, I do bind myself, executors, and administrators, to warrant and defend the said premises to the said Hood, his heirs and assigns, against all persons lawfully claiming the same or any part thereof, and do bind myself to surrender possession of said premises the 1st day of January, 1860," (p. 6, also p. 47, and p. 58.)

Thus the vendor retained a lien upon the estate sold for the purchase-money; there not only being no agreement extinguishing the lien; but there being an agreement showing on its face that the purchase-money remained "*to be paid;*" and that upon—and only "*upon the completion of the payments,*" there would be title in the vendee, his heirs, and assigns. Shields deposes that he "was never applied to for any other conveyance nor should" he "have made any other if applied to, without full payment of the whole amount of the purchase-money due on the land. The instrument or deed was drawn in the terms therein employed, to hold and continue the land sold, subject to the payment of the purchase-money. It is a form customary in such transactions, precluding the necessity of any other special instrument to secure the payment of the purchase money," (p. 52 answer to q. 6.)

In answer to cross-interrogatories, Shields says, (pp. 53, 54,) "The land was sold to H. M. Hood, senior, and his responsibility, coupled with the vendor's lien, secured by the regular form and terms of the instrument, was deemed by me a sufficient security. H. M. Hood, junior, accompanied his father to my house, and was represented by his father to be his agent, holding and managing for him a landed and planting interest, which he, H. M. Hood, senior, has acquired opposite to Waco. I do not remember why it was that H. M. Hood, junior's, name was signed to the notes. The deed or instrument was prepared, to the best of my recollection, before the notes and in the absence of Mr. Hood. The notes after the arrival of Hood & Son,—their joint signatures was probably a suggestion of the moment and did not alter or take from the facts recited in the instrument. H. M. Hood, Sen., did execute the notes to secure the payment of the amounts, and at the time and for the consideration mentioned in the deed. The additional signature of

Hood, Jr., was simply that much more—a gratuity not called for by nor altering the contract." In answer to 2d cross-interrogatory, Shields says, (p. 54,) "The reason for not taking a mortgage is shown by the terms of the instrument, by which the vendor's lien is plainly retained and held:" "it being considered of course that any obligation of warranty in the instrument would only be made perfect and complete upon the payment of the whole amount of the purchase-money."

There has not been "completion of the payments;" and the lien has not been released. On the contrary, of the last installment, only part has been paid. Though, on the 1st of April, 1860, there was given for $5,015 part thereof, the negotiable note, p. 76, payable, as that installment was payable, on the 1st of April, 1862, yet this was received on the terms of "retaining the original lien which was positively and unequivocally stipulated and agreed" between vendor and vendee "at the time of the execution of the said note of $5,015," (p. 32, answ. to qu. 2, 3, 4.) In answer to 9th interrogatory, Shields says, "Mr. H. M. Hood, Sen., executed to me the note for $5,015 to secure the payment of that amount remaining of the last installment, after deducting the amount paid me in advance, with the distinct understanding between us that such payment of a part in advance and the execution of his note to secure the payment of the balance at the time stated, made no difference whatever respecting the vendor's lien to secure the payment of said balance; in other words, that the land should continue just as liable to secure payment of said balance as before," (p. 53.) Shields being asked (11th interrogatory, p. 44,) whether, about Jan. 1, 1860, or at any other date, Hood stated anything in regard to the purchase-money having been paid, and whether he acquiesced in such statement, answers—"He never did to me nor anyone else within my know-

ledge. If he had done so I certainly could not, and should not have acquiesced in any such statement, the same being directly the reverse of the facts in reference to both of the last installments," (p. 53.) In answer to 3d cross-interrogatory, Shields (p. 54,) makes this statement—"During the latter part of March or 1st of April 1860, H. M. Hood, Sen., visited me at my house where I now reside, and proposed to pay me with some surplus funds he had in New Orleans, a part of the last $9,000 note (the other $9,000 note, having been previously negotiated by me with a retention of a partial interest in the same to James M. Wright, who had also negotiated it to a Bank at Fayetteville, N. C.) I acceded to Hood's proposition, and received from him a draft on his merchants, Cumming & Co., in New Orleans, for the amount he proposed paying then, taking his note for the balance of $5,015, payable on the 1st day of April, 1862, as stipulated in the original note. This giving of a draft for a portion of the note in advance and taking another note, was simply a matter of convenience suggested by the nature of the transaction, and not intended; in any manner, or to any extent whatever, to impair or affect the lien retained by the terms of the instrument to secure the payment of the whole amount of the purchase-money. It was expressly so stated and understood, without question between us, at the time."

On the back of the note for $5915, is this endorsement: "For value received, I assign, transfer, set over and deliver the within note, with all the equitable and vendor's lien on the land, for the purchase-money for which it was given to Z. Bartlett." In answer to the 5th interrogatory, Shields says, "I traded the note to Z. Bartlett, sometime during the Fall of 1862, for something over a hundred bales of cotton, delivered to me on the plantation of George Robinson.

I stated to Bartlett that the note was secured by the liability of land therefor, which I had sold to Mr. Hood, it having been executed to me by Hood, for the balance due me in that transaction. Mr. Bartlett received the note from me, understanding the matter as I did," (p. 52.) In answer to 10th interrogatory, Shields says, "By my endorsement on the note, I meant to transfer to Bartlett my right of property in the note and the vendor's lien upon the land to secure its payment," p. 53. In answer to 4th cross interrogatory, Shields states that he "believed at the time that Mr. Bartlett had special reference to that fact in the transaction, and that he felt that the note of H. M. Hood, Sen., to secure the remainder of the last payment for the land with the right of the vendor's lien upon said land was safer for him (Bartlett,) than the cotton then liable at any moment to impressment." The statements of Shields are confirmed by Bartlett (answer to interrogatories 2d, 4th, 6th and 8th, pp. 55, 56, and answer to cross interrogatories 1, 4 and 10, pp. 56, 57.) In his answer to the 2d cross-interrogatory, Bartlett says, B. G. Shields endorsed the note simply. I wrote no words on the note in his absence. It was emphatically understood that the note was a vendor's lien, on the land sold Hood, near Marlin, and I was authorized to make such endorsement thereon. Shields stated that the original note was for $9000, a part of which note was paid, and that the $5,015 note was given in lieu thereof, it being the residue of the last payment on the place sold Hood," (p. 56.)

L. G. Scogin and J. S. Hanna might have seen of record, the deed from Shields to H. M. Hood, (p. 7 and p. 57,) when they took the deed of the 22d of May, 1863, from Hood, for the same land, (pp. 7, 8.) Shields being asked whether either Hanna or Scogin ever called upon him to know if he had been paid all the

purchase money for the land, and what he would have stated if so called on, answers to this interrogatory, (the 8th,) "Neither Mr. Hanna or Mr. Scogin, nor any other person, that I remember of, ever applied to me for such information. If they had made such application to me, I should have stated to them, that I had received a protest from New Orleans, notifying me of the non-payment of the note, given to secure the second installment of $9000, mentioned in Exhibit No. 2; also that I held Mr. Hood, Senior's note to secure the payment of a balance of $5015, due on the last installment of $9000, for said land," (p. 53.) Being interrogated (in 13th interrogatory) as to his and their place of residence in May, 1863, and the distance of his residence and the land, from Marlin in Falls County, Hood answers, "J. S. Hanna resided in Robertson County, and L. G. Scogin about that time, as well as I can remember, moved from Robertson to Falls County. As to the precise time of the year of Mr. Scogin's removal to Falls County, I am not certain. I now live, and have lived for the past ten years, in eleven miles west of Marlin, in Falls County. The tract sold to Hood is contiguous to the 640 tract, upon which Marlin is situated," (p. 53.) Bartlett knew nothing of the contemplated sale to Hanna and Scogin until it was completed, (answer to 5th interrogatory p. 57, see also his answers to cross-interrogatories 3, 5 and 6.) Bartlett notified Scogin after their purchase (p. 59, answer to 6th cross-interrogatory.)

The land which on the 4th of March, 1859, was sold for $27,000, and on the 22d of May, 1863, was estimated to be worth 44 or 45 thousand dollars *in gold* (p. 26,) was sold by Hood to Scogin and Hanna, for $45,000, in the notes of the then Confederate States (p. 26,) the depreciation of which had been rapid and was then great (answer to 14th interrogatory p. 53.) According to the

answer of Shields to 5th and 6th cross-interrogatories the land was worth a great deal more in such notes (p. 55.) See also, answers of Bartlett to 7th interrogatory p. 56 and to 7th and 8th cross-interrogatories. He supposes "the land in 1863, well worth $40, per acre in the currency we had," (answer to 9th cross-interrogatory p. 59,) which would have amounted to $72,000, there being 1800 acres, (p. 6.)

Nothing having been paid to Bartlett on the note, (ans. to 3d interrog., p. 55,) and he having been adjudged a bankrupt, P. De Cordova, who was appointed assignee on the 6th of November, 1867, and to whom there was an assignment of the bankrupt's estate (pp. 2, 3,) filed his bill (p. 1 to 5,) on the 21st March, 1868, to enforce the vendor's lien which had passed by the assignment from Shields to Bartlett and from Bartlett to his assignee in bankruptcy, the executors of Hood being made defendants as well as Scogin and Hanna.

To this bill and the amended bill, (pp. 15 to 17,) Scogin and Hanna filed the answer, (pp. 19 to 27.) A second amended bill, (p. 31,) was filed, (pp. 33, 39;) but all further answer from Scogin and Hanna was waived, (p. 32.) Process was duly served on Hood's executors, (pp. 34, 35,) and as to them the bills were taken for confessed, (p. 39.) To the answer of Scogin and Hanna, there was a general replication, (p. 40.) And thereupon the cause was set for hearing, (p. 41.)

Depositions were taken, under a commission, for the plaintiff, (pp. 41 to 59;) and for defendants without commission, as per agreement, (pp. 59 to 78.)

The bill claiming a vendor's lien, the answer and replication thereto, may be regarded as raising the questions presented in appellee's brief, (p. 6.)

Upon a hearing, the Court made the decree, pp. 81, 82.

Assignment of Errors.

The decree is erroneous—1st, in dismissing the bill as to Scogin and Hanna, and allowing them their costs.

2. In not sustaining the lien on the land as claimed in the bill.

3. Supposing it proper to decree in the first instance against Hood's executors, there should be a reservation, (if execution on this decree prove unavailing,) of the right to a decree for a sale of the land.

Brief of the Argument.

I. The vendor has a lien for purchase-money. *Macreth* v. *Symmons*, 15 Ves., 350; *Cox* v. *Fenwick*, 3 Bibb, 184; *Garson* v. *Green*, *&c.*, 1 John's Ch. R., 308. A great variety of cases establish it as a clear equity, that a vendor has, in all cases, a lien upon the estate sold for his purchase-money, unless there has been a special agreement extinguishing that equity. The taking drafts, which were subsequently dishonored, did not affect the lien in *Peake's* case, 1 Madd., C. R., p. 355 of Eng., p. 196 of Am. Edi. Neither was the lien affected by the notes taken as security in *Eubank* v. *Poston*, 5 Monroe, 285; or by the bond taken as security in *Winter* v. *Ld. Anson*, 1 Sim. & Stu., 434, 1 Eng. Ch. R. For though the vice-chancellor (Sir *John Leach*,) held that it was affected thereby, yet his decision was reversed by the decision of the Ld. Chancellor, (*Ld. Lyndhurst*,) in 3 Russ., 488; 3 Cond. Eng. Ch. R.

It might, if necessary, be maintained here that "the lien is expressly reserved in the deed."—"It arises by express contract, and became a matter of record, and full notice to all who might deal with the property."

"This, then, is more than an ordinary vendor's lien. It is a written contract that the land shall be burthened with the lien until the notes are paid." *Carpenter, &c.*, v. *Mitchell*, 54 Illinois, 130. "Being a lien created by contract," the circumstance that H. M. Hood, Jr., signed the notes "did not affect the agreement of the parties that the lien should be created." S. C., 131.

II. The lien which the vendor had for the price of his estate has never been released. *Grant* v. *Mills*, 2 Ves. & Beam., 309. It was considered that the new bond was not a substitution of the charge, and there was no release to discharge the estate, in *Saunders* v. *Leslie*, 2 Ball & B., 514. The vendor retains his lien unless he shall have done something which evinces his intention to abandon it, *Clark* v. *Hunt*, 3 J. J., Mar. 558; *Stewart's executors* v. *Abbott, &c.*, 9 Grat., 252. The vice-Chancellor in 1842, (Sir *J. L. Knight Bruce*,) was not satisfied that the agreement was understood and intended to be that the estate should be absolutely discharged, whether the bills were honored or dishonored, productive or waste paper. *Tod* v. *Carruthers*, 2 You. & Col., (Excheq.,) 39. Even when money has passed as a payment, the plaintiff is at liberty to show that what appeared at the time to be a good and satisfactory payment was perfectly illusory. It is so even at law. *Pritchard* v. *Hitchcock*, 6 Man. & Gr., 166, 46 Eng. C. L. And it is yet more plainly so in equity. *Knisely* v. *Williams*, 3 Grat., 265. In Virginia, in 1859, *Allen, P.*, said of the vendor in the case before him: "Whatever might be the position he occupied at law,—in equity which regards substance and not form, he stood as the unpaid vendor retaining the legal title. If the case stood alone between him and his vendee, could the latter compel him to relinquish the legal title until he had clothed himself with the legal title by the payment of the purchase-money? Would he be heard to say that

by shuffling the securities the purchase-money was satisfied though he had never paid, and his vendor had never received a cent? Would he not be told, in the language of the president of this Court in *Watts* v. *Kinney*, 3 Leigh, 275, 295, "that a Court of equity looks to substance, not to form; that it looks to the *debt* (here the purchase-money,) which is to be paid, not to the *hand* which may happen to hold it; that the fund (now the land,) charged with its payment shall be so applied, whosoever may be the person entitled; that it considers a debt as never discharged until it is discharged by payment to the proper person and by the proper person." *Yancey* v. *Mauck, &c.*, 15 Grat., 310. So it was held in *Knisely*, v. *Williams*. There the vendor of land took a bond for the purchase-money, and retained the title to the land. He afterwards agreed with the vendee to receive an order on a third person, payable at a distant day, for the amount of the bond. The order was given and the bond surrendered; but when the order was presented the drawee refused to accept. It was held that the surrender of the bond and the taking of the order did not discharge the land, and that the vendor, upon the refusal to accept the order, could proceed forthwith, the purchase-money being due at the date of the order, to enforce the specific execution of the contract, obtain a decree for the payment of the purchase-money, and to subject the land to sale for the satisfaction thereof." 15 Grat., 311.

III. If Ld. *Hardwicke* ever said that the lien of a vendor is not to prevail for the benefit of a third person, that *dictum* is not to be supported. *Selby* v. *Selby*, 4 Russell, 336, 3 Cond. Eng., Ch. R. The lien continues in full force, notwithstanding the assignment, and passes thereby to the assignee. *Kenney* v. *Collins*, 4 Littell, 289; *Johnson* v. *Gwathmey*, Id. 317; *Eubank* v. *Poston*, 5 Monroe, 287; *Parker* v. *Kelly*, 10 Smedes & M., 184;

Kelly v. *Payne*, 18 Alab., 371; *note* to *Mackreth* v. *Symmons* 1 White and Tudor's lead. cas. in Equity. 245. In Texas, in 1855, it was distinctly held that "the assignment of the note carried with it the vendor's lien for the purchase money." *Wheeler*. J., in delivering the opinion of the Court, used language which is pertinent here. "The filling up of the blank endorsement with the words used did not change the liability created by law upon the endorser; nor does it appear that it was not in exact conformity to the agreement under which the endorsement was made." *Moore* v. *Raymond*, 15 Texas, 556. In accordance with this are the decisions in Virginia, *Yancey* v. *Mauck*, &c., 15 Grat., 309. In 1869, the Supreme Court of Appeals of that State considered that when "the assignment is not without recourse, the weight of authority is that the lien continues in full force, notwithstanding the assignment, and passes thereby to the assignee." *Mayo's executor* v. *Carrington*, *&c.*, 19 Grat., 121. In this case the assignment was not without recourse, and there was "no doubt but that the assignor intended to pass to the assignee all the lien which he had for the security of the debt." *Moncure*, P, said "We therefore think that the assignment in this case, did not discharge the equitable lien of the vendor, and that the same may be set up by the assignee, if indeed, there should be any occasion for setting it up." S. C. 19 Grat., 121.

Moreover, the instrument of the 5th of February, 1859, contains in effect an agreement, "that there should be a lien on the land to secure the payment of the notes, and that the assignee of the notes, should have the right to enforce it. "*Carpenter &c.* v. *Mitchell*, 54 Illinois, 130.

IV and VI. When there would be a lien as between vendor and vendee, the vendor has the lien against a third person who had notice that the money was not paid

Mackreth v. *Symmons*, 15 Ves. 349; *Grant* v. *Mills* 2 Ves. & Beame 309; *Clark* v. *Hunt* 3 J. J. Mar., 560, 561; *Arnold* v. *Patrick*, 6 Paige, 315. There is a presumption of notice, where, by the exercise of ordinary diligence, without any extraordinary precaution, a man cannot but acquire knowledge of the fact charged. The principle applies where a purchaser cannot make out a title, but, by a deed which leads him to a fact material to it; he will not be deemed a purchaser without notice of that fact, but, will be presumed conusant of that fact; for it is deemed gross neglect if he sought not after it. The language of the Court of Appeals of Kentucky applies—that "a seller who has taken so much pains, as is done here, to place notice in the road of all who would thereafter attempt to purchase, so that they must stumble over it, if they would not watch their feet, ought not to be deprived of the lien to which the law entitles him." *Johnson* v. *Gwathmey*, 4 Littell, 319; *Beirne's executor* v. *Campbell*, 4 Grat., 125; *Pilcher* v. *Rawlins*, L. R. 11 Eq. Cas. 62, 63.

Clearly the deed, p. 6, put Scogin and Hanna on the enquiry whether the lien was or was not removed which the purchase money necessarily created; 4 Littell 321. It fixed them with notice of those circumstances which, if reasonable diligence had been used, would have led to a knowledge that part of the purchase money remained unpaid; the principle being that "whatever is notice enough to excite attention and put the party on his guard and call for enquiry, is also notice of everything to which it is afterwards found that such enquiry might have led, although all was unknown for want of the investigation." *Kennedy*, v. *Green* 3 Mylne & Keene 699, 10 Cond. Eng., Ch. R.

Moreover Scogin and Hanna had actual notice of the deed of February 5, 1859, (p. 67,) and there can be no

danger of doing them injustice if they are held to be bound by all the consequences of that which they knew to exist.

Knowing of the existence of that deed—knowing that the purchase money therein mentioned was 'to be paid' in installments, and seeing on record no release of the lien, no acknowledgment of payment of those installments, Scogin and Hanna were bound to enquire as to 'the completion of the payments,' and bound to make the enquiry of the proper party. It was not enough to enquire of Hood, the vendor, on whom had rested the liability to pay; the enquiry should have been made of Shields, the vendor, in whose favor that liability had existed; and if enquiry about it of him had furnished, as it doubtless would, information of the amount unpaid, the note taken therefor and the assignment of that note to Bartlett, then enquiry should have been made of Bartlett to ascertain whether the note so assigned to him had been paid or not. The greater the facilities of Scogin and Hanna for making inquiries of Shields and Bartlett, the more gross is their neglect in not making such enquiries. The evidence, already mentioned, *ante* pp. 3, 4, 5, showing clearly what would have been the information received had enquiry been made of either, it follows that Scogin and Hanna cannot be regarded as *bona fide* purchasers without notice. *Kyles* v. *Tait's admr.* 6 Grat., 44. Purchasing at a low price, they may, for this reason, have been more willing than they would otherwise have been to rely on Hood's warranty in the deed to them and on his solvency. They may have been imprudent in relying thereon so much as they did when they made payments to Hood and expended money on improvements; but they are not less chargeable on that account for purchase money due from Hood to his vendor.

V. The 16th section of the judiciary act of 1789 is merely declaratory, making no alteration in the rules as to the jurisdiction of equity. That the remedy at law is not as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity, is sufficient ground for the exercise of equitable jurisdiction. *Boyce's exec's* v. *Grundy* 3 Peters 215. The cases already cited on other points are abundantly sufficient to show that equity has jurisdiction to enforce the vendor's lien. The jurisdiction exercised in the English chancery and in the Courts of most of the States, (*Carpenter &c.* v. *Mitchell*, 54 Illinois, 132) is also exercised in the Courts of Texas; and in the Courts of the United States, *Chilton* v. *Braiden's admr.* 2 Black, 458. In Texas it was exercised in 1855 at the instance of the vendor's assignee, *Pinchain* v. *Collard*, 13 Texas, 336. The decree provided for execution against the maker of the note; and enforced the lien on the land, though it had been reconveyed to the vendor. *Moore &c.* v. *Raymond* 15 Texas 544.

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February 8, 1873.